ICAYUNE, NEW ORLEANS, LA., MONDAY MORNING, SEPTEMBER 23, 1968

Court to Rule on Wiretapping

WASHINGTON (AP) — To Justice Oliver Wendell Holmes wiretapping was "a dirty business."

Only last May, U.S. Solicitor General Erwin N. Griswold said it has caused so many headaches there were times he felt like turning the government's files in such cases over to the Treasury Department to be "mascerated, shredded and burned" with old paper money.

Griswold obviously curbed the desire and so the Supreme Court, at the start of its new term next month, will consider the status of what lawyer Edward Bennett Williams calls the government's "warehouse of stolen privacy."

The question is whether and how much this "warehouse" should be opened to convicted spies, extortionists and other criminal defendants to insure justice.

GIVEN GREEN LIGHT

At least since 1940, when President Franklin D. Roosevelt sent a confidential memorandum to Atty. Gen. Robert H. Jackson, federal agents have had a green light to bug to gather national security information.

And until the summer of 1965 when President Johnson ordered a halt, they have been eavesdropping far beyond the field of national security. Almost to a man, law enforcement officials consider wiretapping and eavesdropping indispensable in fighting crime.

As the new term opens it already is settled that:

—Convictions based on evidence obtained by illegal eavesdropping cannot stand.

—The government has an obligation to disclose that a criminal defendant has been bugged if the bugging contributed to the prosecution.

—The government doesn't have the right to determine on its own whether the bugging was essential to the prosecution's case.

MAKING DETERMINATION

The justices' new job boils down to deciding how this determination is to be made: by a judge in secret or at a hearing after defense lawyers have looked at the government's files.

Two cases up for argument present the problems squarely, inside and outside the field of national security.

One concerns the conviction of John W. Butenko, an American engineer, and Igor Ivanov, a Russian chauffeur, of conspiring to spy for the Soviet Union.

The other involves the conviction of Willie I. Alderman of Las Vegas and Felix "Milwaukee Phil" Alderisio of Chicago of conspiring to threaten the life of a Denver lawyer.

APPEAL OF CONVICTION

Williams, in appealing Ivanov's conviction to the court last December, offered this intriguing footnote:

"No question is raised concerning illegal electronic surveillance, on the assumption that the solicitor general will, if there was any, disclose its presence."

This led to government disclosure that conversations of both Ivano and Butenko had been bugged. The government acknowledged also that Alderisio had been bugged in Chicago.

The Supreme Court held a hearing on the two cases in May but called for a second round of argument in the coming term.

TWO ARGUMENTS

The Justice Department advances two major considerations in trying to win a ruling that the trial judge—not the defendant or his lawyer—should see the wiretap logs and bugging data first and in secret.

One consideration begins with the proposition that the government often must use electronic surveillance to gather information in spy cases and that the government should have the right to decide when it is reasonable to bug.

The very nature of security operations often makes it impossible for the government to make public disclosures, Griswold maintains.

He reminds the Court that it said in a different context in 1963 that "while the Constitution protects against invasion of individual rights, it is not a suicide pact" for the government.

HARM TO OTHERS

The second consideration is that the defendants were not bugged delivering monologues. They were talking to other people—people whose reputations could be injured, the solicitor general says, if the conversations were made public.

Lawyer Charles Danzig of Newark, in a brief for Butenko, says "it seems paradoxical that the government after invading the rights of these very persons now asserts itself as protector of their interests."

However, he says, there are ways to protect so-called third parties: the judge could use his contempt power to keep their names secret, o rhe could close part of the hearing.

Williams, the attorney for Alderman and Alderisio as well as for Ivanov, says national security should not be used as a talisman to suspend the right to a fair and full hearing.

FOURTH AMENDMENT

The fourth amendment, which protects citizens against unreasonable searches and seizures, "carries with it no exemptions for spy-catchers and subversive-hunters," he says in a brief for Ivanov.

Williams argues that only through cross-examination of witnesses and examination of bugging logs and summaries can a defendant rebut government evidence.

The court can choose between these two positions. Or it could fashion a compromise, particularly in security cases.

Williams suggests, for example, the government could ask the judge to issue an order to prohibit the defendant's lawyer from disclosing what is turned over to him.